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No. 02-1591

IN THE

Supreme Court of the United States

NEBRASKA TELECOMMUNICATIONS ASSOCIATION AND NEBRASKA CABLE COMMUNICATIONS ASSOCIATION,

Petitioners,

v.

CITY OF LINCOLN, NEBRASKA, d/b/a LINCOLN ELECTRIC SYSTEM,

Respondent.

On Petition For Writ of Certiorari To The Nebraska Supreme Court

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* INDEPENDENT TELEPHONE AND TELECOMMUNICATIONS ALLIANCE, NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION, ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES AND UNITED STATES TELECOM ASSOCIATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, the Independent Telephone and Telecommunications Alliance, the National Telecommunications Cooperative Association, the Organization for the Promotion and Advancement of Small Telecommunications Companies and the United States Telecom Association ("the Associations"), hereby move to file a brief as *amici curiae*. The motion is requested because respondent City of Lincoln, Nebraska, d/b/a Lincoln Electric System, refuses to grant written consent to file an *amici* brief. Petitioners Nebraska Telecommunications Association and Nebraska Cable Communications Association provided written consent.

The Associations are uniquely positioned to provide a national perspective on the need for certainty regarding the issue in this case: the meaning and scope of Section 253 of the Communications Act of 1934, as amended. There are compelling legal, policy and market reasons discussed by the Associations in the accompanying brief for resolving the current conflict that exists among the circuits on this issue. The privately-owned telecommunications companies represented by the Associations have a strong interest in the resolution of the conflict regarding whether state policy determinations concerning the provision of telecommunications services by state political subdivisions have been preempted by the federal government so that these companies may plan for and make necessary business and investment decisions.

The decision below, which upholds federal preemption of state authority over its political subdivisions, is at odds with U.S. appellate and state court decisions and creates substantial uncertainty in the telecommunications industry. The Associations are deeply concerned that the decision

below has impeded the ability of state legislatures to exercise state sovereignty over these matters. The Associations believe that the provision of telecommunications services by the political subdivisions of a state presents unique issues and states should be free to impose restraints on their political subdivisions where they believe doing so would constitute sound public policy that is consistent with federal and state law.

For these reasons, and those discussed in the attached brief, the Associations respectfully request leave to file a brief *amici curiae*.

Respectfully submitted,

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INTEREST OF THE *AMICI CURIAE*

Amici Independent Telephone and Telecommunications Alliance ("ITTA"), National Telecommunications Cooperative Association ("NTCA"), Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO") and United States Telecom Association ("USTA") are national trade associations representing local telephone companies operating in Nebraska and throughout the country.[1] ITTA was organized in 1994 and represents 13 midsize local exchange carriers that collectively serve approximately ten million access lines in forty states, including two local exchange carriers in Nebraska. NTCA, established in 1954, is an association of 560 rural telecommunications providers that serve the more sparsely populated, remote and rural areas of the United States, including 24 telecommunications providers in Nebraska. OPASTCO, established in 1963, represents more than 500 small, independently owned local exchange carriers primarily serving rural areas of the United States and Canada, including 21 local exchange carriers in Nebraska. Founded more than a century ago, USTA represents some 600 facilities-based incumbent wireline providers of local telephone service which operate more than eighty percent of the country's local access lines, including 17 incumbent wireline providers in Nebraska.

The member companies of the *amici curiae* Associations are subject to the provisions of the Communications Act of 1934, as amended, ("Communications Act"), 47 U.S.C. §§ 151 et. seq., and are regulated by both state and federal regulatory authorities. The business and investment decisions of these companies are directly affected by the

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[1] No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than the *amici* and their counsel, made a monetary contribution to this brief's preparation and submission.

states' ability to control the entry of their own political subdivisions into the telecommunications service market at issue in this case. These companies seek intervention by this Court to provide certainty as to the meaning and scope of Section 253 of the Communications Act, as amended, 47 U.S.C. §253.

SUMMARY OF ARGUMENT

The scope of authority conferred upon local political subdivisions within a state is one of the most critical determinations of state sovereignty made by the elected representatives of the states. Specific to telecommunications, the state legislative decision to allow or not to allow the political subdivisions of a state to provide telecommunications services directly impacts state economies, state revenues and taxes, and both public and private telecommunications infrastructure investment decisions. Case law extends great deference to such state judgments. *See Gregory v. Ashcroft,* 501 U.S. 452 (1991). Only when Congress expresses a clear intent to preempt such state judgments has this Court reversed the norm and required state policy determinations to give way to contrary federal policy decisions. Taken as a whole, Section 253 does not provide the clear and manifest congressional intent necessary to deprive the states of the authority to make such important determinations.

There is, however, an increasing body of conflicting cases addressing whether Section 253(a) of the Communications Act expresses a clear intention by Congress to preempt state laws that regulate or prohibit a state's political subdivisions from providing telecommunications services. Petitioner seeks review of the decision of the Nebraska Supreme Court holding that Section 253(a) preempts state authority. *In re Lincoln Electric System,* 655 N.W.2d 363 (Neb. 2003). This decision carries legal and economic consequences that will have repercussions regarding state sovereignty and that will directly impact the daily business and investment decisions of states, political subdivisions, private telecommunications companies and consumers. It is necessary for this Court to provide the clear guidance urgently needed by the divided lower courts and the affected states, the political subdivisions of the states and private telecommunications companies.

ARGUMENT

I. THE DECISION BELOW REFLECTS THE GROWING CONFLICT AMONG STATE AND FEDERAL COURTS REGARDING THE SCOPE OF FEDERAL PREEMPTION OVER STATE AUTHORITY IN SECTION 253(a) OF THE COMMUNICATIONS ACT.

Conflicting interpretations of Section 253(a) of the Communications Act of 1934 ("Act"), 47 U.S.C. § 253(a), by two U.S. appellate courts as well as by the highest courts of two states within the Eighth Circuit, are creating enormous uncertainty in the telecommunications industry, affecting the ability of the Federal Communications Commission ("FCC"), the states, the political subdivisions of the states and private telecommunications companies to make decisions regarding the provision of telecommunications services to the public.

As amended by the Telecommunications Act of 1996, ("1996 Act") Pub. L. No. 104-104, 110 Stat. 56, Section 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). If the FCC finds that "a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a)..., the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency." 47 U.S.C. § 253(d). The question as to whether the statutory language deprives the states of the ability to control their political subdivisions' provision of telecommunications service has resulted in inconsistent decisions from the U.S. Court of Appeals for the Eighth Circuit and the U.S. Court of

Appeals for the District of Columbia Circuit, as well as between the Nebraska Supreme Court and the Iowa Supreme Court. The appropriate interpretation of the statutory language presents an important Federal question requiring resolution by this Court so that the telecommunications services industry may develop with certainty as to the scope of Section 253(a) relative to a state's authority to limit or prohibit its political subdivisions' ability to provide telecommunications services.

In the case below, *In re Lincoln Electric System,* 655 N.W.2d 363 (Neb. 2003), the Lincoln Electric System ("LES"), a political subdivision of the State of Nebraska, filed an application with the Nebraska Public Service Commission ("PSC") to provide contract telecommunications services in and around Lincoln, Nebraska. The PSC denied its application and the LES appealed to the Nebraska Court of Appeals. The Nebraska Supreme Court removed the case to its docket. While the appeal was pending, the Nebraska legislature passed a law prohibiting a political subdivision from holding a permit as a contract carrier of intrastate telecommunications service. Neb. Rev. Stat. §§ 86-128(1)(b) and 86-575(2) (Cum. Supp. 2002).

In its decision, the Nebraska Supreme Court recognized the significant split of authority regarding the scope of federal preemption under Section 253(a). *Lincoln,* 655 N.W.2d at 369-371. The Nebraska court observed that in *City of Abilene v. FCC,* 164 F.3d 49 (D.C. Cir. 1999), the D.C. Circuit upheld an FCC order refusing to preempt Texas law prohibiting municipalities or municipally-owned electric utilities from offering for sale certain telecommunications services.[2] The D.C. Circuit decision, relying on this Court's

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[2] *In re Public Utility Commission,* 13 FCC Rcd 3460, 3545-3546 (1997). In that proceeding, the FCC was unable to find that the use of the term "any entity" in Section 253(a) constituted a sufficiently clear statement

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opinion in *Gregory,* held that the language of Section 253(a) was not sufficiently clear to find that Congress intended to include municipalities in the category of "any entity." *Id.* at 54. The Nebraska court also acknowledged that the Iowa Supreme Court had determined that Section 253(a) did not prevent the state from regulating the provision of telecommunications services by state political subdivisions. *Iowa Tel. Ass'n. v. City of Hawarden,* 589 N.W. 2d 245 (Iowa 1999).

The Nebraska court, however, diverged from the holdings of the D.C. Circuit and the Iowa Supreme Court, and instead followed the decision of the Eighth Circuit in *Missouri Municipal League v. FCC,* 299 F.3d 949 (8th Cir. 2002).[3] The Eighth Circuit found that "municipality" was clearly within the definition of "any entity" as used in Section 253(a) and preempted Missouri laws prohibiting political subdivisions from providing telecommunications services.[4] The Nebraska court thus held that Congress' use of the term "any entity" in Section 253(a) indicated an expansive

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that Congress intended to preempt state authority, citing this Court's decision in *Gregory v. Ashcroft,* 501 US 452 (1991) (fundamental state decisions remain within the state's authority absent a clear indication of Congressional intent).

[3] The Eighth Circuit decision is pending before this Court. *See Federal Communications Commission v. Missouri Municipal League, et. al,* 299 F.3d 949 (8th Cir. 2002), *petition for cert. filed* (U.S. Mar. 20, 2003) (Case No. 02-1386). Given the similarity of the issues, *amici* support the request of petitioners that if the Court grants review of the Eighth Circuit decision, this Petition for Writ of Certiorari be granted and this case be consolidated with the Eighth Circuit case for briefing and oral argument.

[4] *Accord City of Bristol, VA v. Earley,* 145 F. Supp.2d 741 (W.D. Va. 2001) (state statute which prohibited local governmental entities from offering telecommunications services was preempted by Section 253(a)) *dismissed on appeal as moot, City of Bristol, VA v. Virginia Telecomm.* No. 01-1741 (4th Cir. May 1, 2002).

statutory scope that would include a political subdivision otherwise subject to the sovereign authority of its controlling state. Further, the Nebraska court found that the Nebraska laws prohibiting political subdivisions from the provision of telecommunications services are preempted by federal law and are unconstitutional. *Lincoln,* 655 N.W.2d at 371-372.

The conflict that exists among the federal circuits and the state courts presents a significant issue regarding state sovereign rights to define the boundaries of authority granted to the state's political subdivisions. Review of the Nebraska decision is necessary to resolve its apparent interference with state sovereign rights. Generally, courts will not interpret a federal statute in such a way as to intrude upon an area traditionally regulated by the states absent a clear expression of congressional intent to do so. *Gregory v. Ashcroft,* 501 U.S. 452, 460 (1991). In fact, this Court has made clear that a federal statute does not preempt the authority of a state unless such is the clear and manifest purpose of Congress. *Wisconsin Public Intervenor v. Ralph Mortier,* 501 U.S. 597, 611-612 (1991) (holding that the Federal Insecticide, Fungicide, and Rodenticide Act did not "provide any clear and manifest indication that Congress sought to supplant local authority over pesticide regulation impliedly."). Section 253 does not provide a clear indication of Congress' intention to usurp state authority over the provision of telecommunications services by its political subdivisions.

While some courts have interpreted Section 253(a) to prohibit state control over the entry of political subdivisions into the telecommunications services market, the structure of the section itself is inconsistent with those interpretations. Rather, *amici* submit that Sections 253(b) and (c) inform the meaning of the language of subsection (a), and this Court should consider that Section 253, taken as a whole, was never intended by Congress, either implicitly or explicitly, to

alter the relationship between a state and its political subdivisions.[5] Section 253(b) states that nothing in the section shall affect state authority to impose "requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers," thereby preserving the states' role in regulating intrastate communications. 47 U.S.C. § 253(b). In fact, subsection (b) contemplates that states may restrict entry to prevent erosion of universal service and service quality in rural, high cost and insular areas as required in Section 254. 47 U.S.C. § 254. Similarly, Section 253(c) states "nothing in the section shall affect the ability of state and local governments to manage public rights of way." 47 U.S.C. § 253(c).

As this Court has consistently found, a statute must be read as a whole, since the meaning of statutory language depends upon context. *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Thus, this Court should consider that not only does Section 253(a) lack the clear expression of congressional intent to preempt a state's authority over its political subdivisions, but any arguable ambiguity evaporates when the term is understood in context of the reservation of state authority contained in subsections (b) and (c).

Given the conflicting judicial interpretations, it is important that this Court determine the scope and meaning of section 253 by reading subsection (a) within the context of the whole section as well as by discerning congressional intent as to the meaning of "any entity."

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[5] *See BellSouth Telecommunications v. Town of Palm Beach*, 252 F.3d 1169, 1188-1191 (11th Cir. 2001) (finding that Section 253 should not be interpreted as Congressional intent to take away a state's basic responsibility to protect the public safety and welfare and to provide and promote universal service).

II. RESOLUTION OF THE CONFLICT REGARDING STATE AUTHORITY OVER THE PROVISION OF TELECOMMUNICATIONS SERVICES BY POLITICAL SUBDIVISIONS OF A STATE IS NECESSARY TO PROVIDE CERTAINTY TO THE TELECOMMUNICATIONS INDUSTRY.

The conflict between the Federal and state courts regarding the reach of Section 253(a) poses a significant concern for all providers of telecommunications services that currently operate or seek to operate within a state. In order to make appropriate investment and business decisions, all providers, both private and public, require certainty as to whether political subdivisions of a state will be permitted to provide telecommunications services in that state. As Justice Scalia observed in *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), the telecommunications industry is capital intensive, and private companies must raise capital in order to invest the significant monies required to build and maintain the telecommunications infrastructure necessary to serve the public.

The investment decisions that private companies must make are acutely affected by whether a political subdivision of the state is providing telecommunications services in the marketplace. Political subdivisions benefit from a variety of tax and regulatory advantages not available to the private sector.[6] They generally are able to issue tax-free debt; they have access to public rights of way on terms not available to private companies; they can avoid franchise fees and other taxes private firms must pay; they are not subject to Generally Accepted Accounting Principles applied to private companies and they often can receive interest-free loans or

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[6] *See* JEFFREY A. EISENACH, DOES GOVERNMENT BELONG IN THE TELECOM BUSINESS? at 15 (The Progress and Freedom Foundation, Progress on Point, Release 8.1, January 2001).

access to capital only available to government entities.[7] They may be able to take advantage of inside information regarding local and state contracts and have preferential access to bidding processes for government projects. More importantly, the political subdivision may hold dual roles as both regulator and competitor. These advantages pose important marketplace considerations for private companies that are likely to govern whether private companies will continue to invest in a telecommunications services market served by a political subdivision of a state and could very well inhibit private sector investment. The advantages that exist for a political subdivision that provides telecommunications services will affect whether private providers will be able to compete effectively and will be able to maintain universal service. Whether or not a political subdivision will have a significant presence in the telecommunications services market could materially affect obligations to provide universal service.[8]

A state has a legitimate interest in assessing the impact of the provision of telecommunications services by a political subdivision as it implicates unique issues regarding the potential impact on the state's economy, revenues, taxes and public and private investment within the state. For example,

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[7] *Id.*

[8] There are a number of significant and complex regulatory issues that are before the FCC addressing the universal service obligations of all providers of telecommunications services. *See, e.g., Federal-State Joint Board on Universal Service Seeks Comment on Certain of the Commission's Rules Relating to High-Cost Universal Service Support and the ETC Designation Process,* Public Notice, CC Docket No. 96-45, 18 FCC Rcd. 1941 (2003); *Federal-State Joint Board on Universal Service; Review of the Definition of Universal Service,* Notice of Proposed Rulemaking, CC Docket No. 96-45, 18 FCC Rcd. 2932 (2003); *Federal-State Joint Board on Universal Service,* Report and Order and Second Further Notice of Proposed Rulemaking, CC Docket No. 96-45, 17 FCC Rcd 24952 (2002).

in 1997, the Tacoma Public Utilities, located in Tacoma, Washington, built a publicly-funded telecommunications system.[9] By the Fall of 2000, the original capital budget had grown from $40 million to $86.5 million, the network had not reached a break-even point and plans to extend the system were postponed indefinitely.[10] "Because it is a public utility, the Click! Network is forcing the citizens of Tacoma to take risks that normally would be borne by private stockholders. The result is that the Click! Network is adding unnecessary costs to the already-rising trend of Tacoma's energy prices."[11] The issues and impact of the provision of telecommunications services by a political subdivision, such as those facing the residents of Tacoma, are appropriate for states to consider when determining whether a political subdivision should provide telecommunications services. The political subdivisions of a state should not be free to disregard the assessment of the state legislature as to whether their provision of telecommunications services will be beneficial to the state and to its citizens.

It is very likely that additional controversies regarding the scope of Section 253(a) will arise, as more political subdivisions attempt to provide telecommunications services and more states address whether that is, in fact, desirable. In addition to Nebraska, the states of Arkansas, Florida, Missouri, Minnesota, Nevada, South Carolina, Tennessee, Texas, Utah, Virginia and Washington, have enacted legislation to limit or prohibit the provision of

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[9] PAUL GUPPY, WHEN GOVERNMENT ENTERS THE TELECOM MARKET: AN ASSESSMENT OF TACOMA'S CLICK! NETWORK (The Progress and Freedom Foundation, Progress on Point, Release 9.7, February 2002).

[10] *Id.* at 6.

[11] *Id.* at 9. Similarly, in Iowa, the publicly owned Iowa Communications Network regularly receives major infusions of state funds in order to continue operating. *Id. See* also Iowa Code §§ 8D.11 and 8D.14 (2003).

telecommunications services by the political subdivisions of these states.[12] The decisions of the elected representatives of the states to determine the authority of local political subdivisions are an essential exercise of state sovereignty. The Court should resolve the conflicting interpretations of Section 253(a) and provide much-needed certainty regarding the authority of a state to control or prevent the provision of telecommunications services by the political subdivisions within a state.

CONCLUSION

The petition for writ of certiorari should be granted.

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[12] *See* Ark. Code Ann. § 23-17-490 (Michie Supp. 2001), Fla. Stat. Ann. § 166.047 (West 2000), Minn. Stat. Ann. § 237.19, (West 1992), Mo. Ann. Stat. § 392.410(7) (West Supp. 2003), Nev. Rev. Stat. Ann. § 268.086 (Michie Supp. 2001), S.C. Code Ann. § 58-9-2600 (Law Co-op 2002), Tenn. Code Ann. §§ 7.52-601 *et. seq.* (Supp. 2001), Tex. Util. Code § 54.201, *et. seq* (2002), Utah Code Ann. § 10-18-101 *et. seq.* (2001), Va. Code Ann. § 15.2-1500(B) (Michie Supp. 2001), Wash. Rev. Code § 54.16.330 (2003). See *also Public Power: Powering the 21st Century with Community Broadband Services* (APPA Fact Sheet, Community Broadband Fact Sheet, May 2003) at 4.

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